THE FORMULA PROCEDURE OF ROMAN LAW.[1]

A SCHOLAR of repute has spoken of the formula procedure as "one whose rapidity, brevity and effectiveness has, perhaps, never been equalled." [2] It is our belief that this cautious statement underestimates the fact. It does not seem too much to say without qualification that this method of administering justice was the most remarkable and the most successful that has ever been carried out on a large scale over an extended period in any civilized country. The bare outline of the situation itself will suffice for preliminary proof of the assertion.

When the formula procedure was established in the latter history of the Republic,[3] Rome has already become a world state. The barbarian invasion, the war with Pyrrhus, the long Punic wars, the wars in Macedon, in Greece, and in Syria, were in the background. The Mediterranean was a 'Roman lake' and the sway of the Republic already extended from the Bosporus to the Pillars of Hercules. There was not then left one first-rate opponent to prevent the expansion of Rome to the culminating point where in the time of Hadrian (A. D. 117) its power extended to every outpost of civilization. At the end of the republic, Roman law governed a population of more than fifty millions.[4] The capital city was rapidly growing, due in large measure to the influx of provincials and foreigners.

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[1] *Principal References*: BETHMANN-HOLLWEG "HANDBUCH DES CIVILPROZESSES" (Erste Abt. Bonn 1834); BETHMANN-HOLLWEG "DER ROMISCHE CIVILPROZESZ" (3 vols., 1864, '65, '66: Zweiter Band: *'Formulae'*); BEKKER "DIE AKTIONEN DES ROMISCHEN PRIVATRECHTS" (2 vols., 1871, '73); GIRARD "MANUEL DE DROIT ROMAIN" (5th ed., 1911); GREENIDGE "THE LEGAL PROCEDURE OF CICERO'S TIME" (Oxford 1901); KELLER "DER ROMISCHE CIVILPROCESS UND DIE ACTIONEN" (6th ed., by Wach, 1883); MOMMSEN "ROMISCHES STAATSRECHT."

[2] GREENIDGE "THE LEGAL PROCEDURE OF CICERO'S TIME", 171.

[3] According to Gaius (INST. iv, 30) the formula procedure which partially superseded the *'legis actio'* procedure was instituted by the *lex Aebutia*. See also GELL. xvi, 10. The date of the *lex Aebutia* is uncertain. Cornil ("DROIT ROMAIN", 419) following Girard places the date between 149 and 126 B. C. A full discussion of the point is found in GIRARD "MANUEL" (5th ed.), 998. Cf. WLASSAK "ROM. PROZESSGESETZE" I, 63, 75, 159.

[4] SHERMAN, "ROMAN LAW IN THE MODERN WORLD" Vol. I, 13. The records of the censors showing the population statistics of Rome have not survived.

The outstanding fact, in the light of the remarkable growth of the Roman state, is that for more than a hundred years (366-242, B. C.) the principal part of the administration of civil justice in the Roman capital was in the hands of a single magistrate, the *practor urbanus*. The social organization of the Romans where large powers still remained in the family head and in the *gens*, no doubt is explanatory of the extreme simplicity of the judicial magistracy, but much more we think is due to the system of procedure itself.

I.

The object of this article is to explain in simple terms the method of the formula procedure, avoiding here, so far as may be, all historical and technical detail, for the purpose of demonstrating what seems to us to be the chief defect of our own administration of civil justice. This defect we think rests on this proposition: *A disputed matter of fact or law or of both, cannot be resolved into simple, ultimate questions of the merits of a controversy by any system of procedure which leaves the formulation of these issues to the adversaries themselves.*

A fight is a fight, and it is a commonplace to say that the administration of justice by the state is the logical successor of the ancient remedies of self-help and the blood-feud.[5] The fighters are inclined to pursue every advantage, claiming everything and admitting nothing. Modern law has conceded much, too much, to the contentious origin of the institution of procedure. While it must be remembered that the continuance of the state depends upon the methods by which the interests of its constituent social elements are balanced, yet it is important to notice that these methods are of varying efficacy, and that the efficacy of these methods changes with the times.[6]

[5] Wager of battle introduced into the English law by William the Conqueror was not finally abolished until 59 Geo. III, ch. 46. See THAYER, "A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW" 39-44.

[6] Leist ("ALT ARISCHES JUS CIVILE", 421) has pointed out how in Greece and Latium the development of state legal protection as a substitute for personal revenge and self-help was of slower development than in Persia, attributing the difference, so it seems, to national character. While that factor cannot be ignored the Roman system of law shows in a striking

There was a time when the common law system of pleading was employed as an instrument for confining the wide empire of facts and questions of law to narrow issues actually in dispute. That was the Golden Age when in spite of the technical difficulty and the subtlety of the system, it went far to justify the large claims made for it as a kind of mechanical thinking machine. It can hardly be doubted that in modern application where its art goes no further than a mlutiplication of counts and its science hardly gets beyond the plea of general issue, it has fallen into a sad decrepitude. The chancery system borrowed from Roman law through Canon law is superior at least in the fact that it is intelligible, but both are in actual practice simply burdensome gateways through which the adversaries may pass without legal detriment, unless, perchance, they are uncommonly ignorant, to the real points at issue to be developed on the trial.

The history of Roman procedure has three stages: (1) the *'legis actio'* stage, which we shall call the pontifical stage; (2) the formula period which we shall call the praetorian stage; and (3) the libellary stage which we shall call the bureaucratic stage. We use here the substituted names 'pontifical', 'praetorian' and 'bureaucratic' as convenient designations of the magistracy under which these forms of procedure took shape.

The pontifical stage begins with the use of religious sanctions as a formal method of legal arbitration. That state justice is preceded by arbitration is a fact widely attested by comparative law.[7] At first it is voluntary, and later it becomes compulsory, hardening into a system of forms and rituals. In Rome this legal ceremonial was known as the *'legis actio'* procedure.[8] Much

way at various points how much its development was influenced by mere accidents of method; for example, the *'ordo judicorum'*, the practice of the perpetual edict, *'ius respondendi'*, etc.

[7] MAINE "ANCIENT LAW": SIR F. POLLOCK'S NOTE S: (4th Am. ed.), 444.

[8] GIRARD "HISTORIE DE L'ORGANISATION JUDICAIRE DES ROMAINS"; JOBBE-DUVAL "ETUDES SUR L'HISTORIE DE LA PROCEDURE CIVILE"; CORNIL "DROIT ROMAIN", 80.

[9] Gaius was one of the greatest Roman jurists. He lived in the reigns of Hadrian (117-138 A. D.), Antoninus Pius (138-161), and Marcus Aurelius Antoninus (161-180). He stands seventh in the list represented by the number of pages and extracts in the DIGEST. It is a curious fact that beyond the fact that such an author lived at the time above shown, nothing more is certainly known about him. If Gaius is a *praenomen* his gen-

of what is known about it is based on Gaius [9] whose account follows:[10]

> "These actions which the old law employed are called statute process (*'legis actiones'*) either because they were appointed by statute before the edict of the *praetor,* the source of many new actions, began to be published, or because they followed the statute itself and therefore were as immutable as the statute. Thus, it was held that a man who sued another for cutting his vines, and in his action called them vines, irreparably lost his right because he ought to have called them trees, as the enactment of the Twelve Tables which confers the action concerning the cutting of vines, speaks generally of trees, and not particularly of vines" (Inst. iv, 11).

Gaius then proceeds to enumerate the five forms of statute process—*'sacramentum', 'judicis postulatio', 'condictio', 'manus iniectio'*, and *'pignoris capio'*. These actions fall into three groups: (1) those which are purely primitive in origin. Of this type there are two: *L. A. per pignoris capionem* and *L. A. per manus iniectionem,* corresponding to modern survivals of self-help as found in the landlord's power of distraint, the owner's power of recaption, private arrest, and like instances;[11] (2) one of pontifical invention—the *L. A. sacramento* (a description of which follows); and (3) the *legis actiones* which arose at a later time and under conditions resembling modern times. The remaining actions, *L. A. per judicis postulationem* and *L. A. per condictionem* were of this type.

Gaius gives the following description of the sacramental action:

"The *'actio sacramenti'* was the general form of action, for

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tile name is unknown. Whether he was a Roman or a Greek and whether he lived in Italy or in one of the provinces are also matters of doubt. See ROBY "INTRO. TO JUSTINIAN'S DIGEST" p. cixxiv. The most celebrated work of Gaius was his INSTITUTES, a palimpsest of which was not discovered until 1816 and which was first satisfactorily deciphered by Krüger and Studemund in the present generation. (5th ed. 1905) See MUIRHEAD "HIST. INTRO. TO LAW OF ROME", 308-310.

[10] POSTE "GAI INSTITUTIONES IURIS CIVILIS" 4th ed. by Whittuck (1904).

[11] See the comparative law account of distress by MAINE "EARLY HISTORY OF INSTITUTIONS". On the classification of *'legis actiones'* according to their antiquity, see SOHM "INST." LEDLIE'S TRANS. § 35 n. 17 and the literature there entered.

whenever no other mode was appointed by statute, the procedure was by *'sacramentum.'* It was a form of action attended with risk to the parties, like the action of today to recover money lent wherein the defendant and the plaintiff by the *'sponsio'* and *'restipulatio'* respectively forfeit a penal sum if unsuccessful. Accordingly, the party who was defeated, had to pay the amount of the stake (*'summa sacramenti'*) by way of penalty; but it went to the public treasury, sureties on this account being required to be given to the *praetor,* instead of going, as it does now, by *'sponsio'* and *'restipulatio'*, to the profit of the winning side" (Inst. iv, 12).

Gaius next proceeds to give the detail of the amount of the *'sacramentum'*.[12] In the case of a personal action to recover on an obligation, it seems after the stake was arranged, there was an adjournment of thirty days whereupon a *iudex* was appointed by the *praetor.* When the thing in dispute was a movable, the procedure before the *praetor* was as follows:

"The vindicant held a wand (*'festuca'*) and then grasping the object itself, as for instance a slave said: 'This man I I claim as mine by due acquisition, by the law of the *quirites.* See! As I have said, I have put my spear on him'. Whereupon he laid his wand upon the man. The adversary then said the same words and performed the same acts. After both had vindicated him, the *praetor* said: 'Both claimants quit your hold'. And both quitted hold. Then the first claimant said, interrogating the other: 'Answer me—will you state on what title you found your claim?' And he replied: 'My putting my spear over him was an act of ownership.' Then the first vindicated said: 'Since you have vindicated him in defiance of law, I challenge you to stake as *sacramentum* five hundred asses.' The opposite party in turn used the same words: 'I too challenge you.'" [13] (Inst. iv, 16.)

The above ceremony was then followed by the same procedure

[12] According to Sohm, the *'sacramentum'* originally was an oath by which the party consecrated himself to the gods (INST. § 35 n. 2). Cf. GIRARD "MANUEL", 988 n. 3; CUQ "LES INSTITUTIONS JURIDIQUES DES ROMAINS" I, 409.

[13] This familiar description of the sacramental action of course recalls the equally familiar and comparable shield scene in HOMER: ILIAD xviii 497-508.

as in a personal action. The *practor* awarded *interim* possession of the object and took sureties for the '*summa sacramenti*'. As Gaius tells us, the wand represented a lance which was the symbol of absolute dominion by way of conquest.[14] If the object in dispute could not conveniently be carried before the *praetor,* a portion of it was produced.

The pontifical procedure was essentially ceremonial. The ritual must be strictly observed and a misstep in the form of the words to be used, the intonation, or the gestures was fatal to the action. The forms of action and the days of suit were pontifical mysteries.[15] The holder of the mysteries of the '*ius sacrum*' therefore was a very important person. Cicero, speaking of this cult says:[16]

> "In the next place, even if among our ancestors there was anything of admiration in this study (the '*ius sacrum*') now that your mysteries are revealed, it is altogether despised and degraded. Few formerly knew when they might go to law. For generally the people had no calendar (*'habebant non fastos'*). Those who were consulted were in great power. They were requested for days of consultation as were the Chaldean astrologers. A certain scribe appeared, Cn. Flavius, who might have pierced the eyes of crows [i. e. who had great cunning] and who exposed to the people a calendar to be learned for each day and thus pilfered their own science from the subtle lawyers themselves. Therefore, the lawyers being enraged because they were afraid lest the order of the day for going to law being published and known that the people might go to law without their assistance, they composed certain

[14] GAIUS iv 17.

[15] What seems irrational in this, from the present day point of view, served a very useful purpose in its own day. It was a successful psychological expedient for diverting the instinct for punitive reaction into the channels of peaceable procedure. After all, the pragmatic test of any institution, and perhaps the test of justice itself is *Will it Work?* There can be no doubt that in the early centuries of Roman law no other system would have worked as well. It may be remarked that secrecy is a general attribute of early law everywhere. Thus in the Nyals Saga, Skapti an Icelandic lawyer is greatly surprised to find that his adversary knows a point of law which he supposed was known only to himself.

[16] CIC. PRO MUR. 11, 12. A useful alphabetical list of references to the legal passages in Cicero will be found in CAQUERAY "EXPLICATION DES PASSAGES DE DROIT PRIVE CONTENUS DANS LES OEUVRES DE CICERON", Paris, 1857. See also the running apparatus in KELLER-WACH "RCP."

forms (*'notas'*) that their presence might be necessary in all legal transactions.

"When this may have sufficed: 'The Sabine farm is mine; 'No, it is mine' (says the adversary): Judgment is given. But the lawyers would not agree to this mode of procedure. [Because, of course, it was too simple.] Says one: 'The farm which is in the country which is called the Sabine' —verbosely enough. Well, what then? 'I say that farm is mine according to law of the *Quirites?*' What next? 'I call you out of court from that place to contend with me (*'manu consertum'*).[17] When this verbosely litigious demand was made of the defendant, he knew not what to answer. The same lawyer, in the manner of a Latin flute player, now crosses over and says: 'Whence you called me out of court to contend with me, from thence I now call you.' In the meanwhile, lest the *praetor* should think too well of his own abilities (*'putaret se pulchrum ac beatum'*) and should say something of his own, a ritual (*'carmen'*) is invented for him also, if absurd in other things so also here: 'To each, their witnesses being present, I say this is the way; proceed on the way.' That wise lawyer was there at hand who might show the way. 'Return on the road.' They returned with the same leader

"I believe these things even then appeared ridiculous among those bearded ones—that men, when they had placed themselves properly and in the right place, should be ordered to go away, that they might immediately return to the same place whence they had gone. All these forms are smeared with the same follies. 'When I behold you in law' and these 'Or do you only say this or have you maintained the suit?'—while these forms were kept secret, those who held them necessarily were sought after by those having suits. But afterwards when divulged and put into the hands of all and examined, they were found most wanting in sense and full of fraud and foolishness.[18] For when many

[17] *'Manum conserere'* was the symbol to represent the extra-judicial combat of the parties over the thing in dispute. See GELL. xx, 10; VARRO LL vi 64. The expression is not used by Gaius. See MUIRHEAD "RL", 178, n. 5.

[18] These strictures need not to be taken too seriously, however valuable they may be for characterizing the spirit of the pontifical procedure. It is perfectly evident that here Cicero is bantering his boyhood friend Servius Sulpicius who had accused Murena of corruption. Sulpicius was one of the most distinguished lawyers of the republican period; see D., 1, 2, 43.

> things were admirably established by the laws they were generally corrupted and depraved by the ingenuity of lawyers. . . ." [19]

Some of the characteristic features of the pontifical procedure in contrast with modern procedure may now be enumerated. The features, here under discussion, were carried over into the praetorian procedure.

I. In the earliest period of state administered justice the chief function was the appointment of an arbiter.[20] This function developed into a striking institution which remained typical for Roman procedure for a thousand years [21]—the *'ordo iudiciorum privatorum.'* All civil proceedings were divided into two departments: (1) those *'in jure'*, before the magistrate (*'magistratus iuri dicundo'*); and (2) *'iudicio'*, before a private person or persons acting as arbiters or referees.

During all this period the 'judge' in Roman law was not a state officer but a private person. There is some analogy between the referee (*'iudex'*) of Roman law and the English law jury but the differences are more important than the resemblances. There were two kinds of judges or referees: (a) those belonging to standing colleges such as the *'decemviri iudices'* (who originally tried questions concerning slave status) and the *'centumviri'* (whose competency chiefly related to suits of inheritance); and (b) private judges *'iudices privati'* or *'arbitri'*. We are chiefly concerned here with the latter type of judge. The *'iudices'* originally were recruited from the senatorial order (*'ordo senatorius'*) later from the *equites* [22] and in the time of Augustus [23] from four classes (*'decuriae iudicium'*).[24] At this time the number of *indices* numbered about four thousand.[25] The list of *iudices* was posted on the *praetor's* album.

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[19] Cf. the remarks of Caqueray ("EXPL. D. CIC.", 328-336) on this oration.

[20] CORNIL "DR" LIV. V p. 81; PUCHTA "INST." § 175; SAVIGNY "SYST." vi 287.

[21] Until abolished by Diocletian, A. D. 294.

[22] *Lex Sempronia*, 142 B. C.

[23] There was intermediate legislation on the same point, not important here: DIONYS. HAL. ii. 87; POLYB. vi. 17; SEUT. "OCTAV.", 32; PLIN. "HIST. NAT.", 7.

[24] By the *leges indicorum publicorum et privatorum.*

[25] SHERMAN "RL" II, 435.

When the litigants appeared before the *practor* they agreed upon the *iudex*.[26] If they could not agree the *practor* appointed one, though there was a limited power of rejection.[27] The *iudex* who was a private person [28] and who might not even be a lawyer was aided (probably at his own discretion) by a *consilium* of *iurisconsulti*. Cicero in one of his speeches for a client constantly addresses the *consilium* and refers to them as "among the most eminent men in the state".[29]

The principal magistrate for the purposes of this discussion was the *praetor*. Originally the judicial imperium was in the King;[30] then (509 B. C.) this power passed to two consuls; and then (366 B. C.) judicial authority was vested in one *praetor urbanus*. Later, when the business of the court increased through the growth of the capital city, a second *praetor* was appointed (242 B. C.) for foreigners residing in Rome. Still later, *practors* were appointed for the provinces of Sicily, and Sardinia, and subsequently, in the days of the empire, the number of *praetors* reached a total of eighteen.[31]

Other magistrates of lesser importance for the administration of justice were the *curule aediles* (market commissioners), the *praefectus urbi* (with criminal jurisdiction) and the *praesides* (provincial governor).[32]

In the *'ordo iudiciorum'* of the Romans there is as has been seen, a complete administrative separation of the two questions which enter into every litigation. The first of these is what are the rules of law which govern a given claim of legal relations? The second is do the facts show the claimed legal relation? In modern times, a third feature is added—the rule

[26] CIC. PRO CLUENT., 43.

[27] CIC. VERR., 1, 3.

[28] Sometimes an arbiter was appointed. The distinction is clearly stated by CIC. PRO ROSC. COM. 4. Where *peregrins* were concerned, the referees were called *'recuperatores'*: FESTUS "DE VERB. SIGNIF." s. v.

[29] CIC. PRO QUINT. 2.

[30] DION. H. ii, 14.

[31] This enlarged number is however of no special significance as bearing on this discussion which seems to emphasize the efficient character of the praetorian procedure since the great bulk of these magistrates were only administrative officers with the title of *practor*. Pomponius gives a full account of these steps: D. 1, 2.

[32] WILLEMS "LE DROIT PUBLIC ROMAIN" (5th ed.), 257 *et seq.*, 471 *et seq.*

of law being given or found, and the facts being ascertained, application of the remedy given by law is made by an agency of the state. In the pontifical and praetorian stages of procedure, this last step had not been taken as will be shown hereafter. In primitive times, the order of dealing with the elements of litigation is entirely reversed—execution comes first; then the facts are ascertained; and lastly there comes an arbitral judgment.

In the pontifical stages of procedure there may still be found the evidences of primitive methods. Thus the *L. A. per manus iniectionem* (arrest of the person) could be used not only as a means of enforcing a claim but as the first step of asserting one. Likewise was it in the case of *L. A. per pignoris capionem* (seizure of a pledge) which is even today one of the standard remedies of international law for bringing to a defendant notice of a procedural assertion of a claim.[33] But since these remedies were normally employed as a sequence of a successful *'vindicatio'*, it is perfectly clear that Roman law in its earliest historical stage was already an advanced system which is further shown by the fact that the course of procedure was from the beginning of the Roman state regulated by pontifical ceremonies.

Theoretically, of course, the sequence of law and proof might be reversed, but since that method of settling litigation would be highly inconvenient and unnatural it does not appear beyond the range of strictly primitive law. But it must be noticed that even in modern times there is not to be found that clear-cut separation of law and proof which was seen in Rome. The *praetor* could give a *iudicium;* he could adjudge that the action be remitted to a referee for trial; but he could not pronounce a *'sententia'*; he could not decide the concrete question in dispute.[34] The major premise lay with the magistrate; the minor premise lay with the referee (*iudex*). The referee was not under the control of the magistrate; he tried the case apart from the magistrate; and he was under no duty to report his judgment to the

[33] E. g. by reprisal, retortion, embargo, etc. LAWRENCE "INT. LAW" 156 *et seq.*

[34] KELLER-WACH "RCP" § 1. In some cases (e. g. *'praetoria stipulatio'*, *'missio in possessionem'* *'in integrum restitutio'*) the magistrate could act without a *'iudicium'*.

magistrate for approval. There was no appeal from the action of the *iudex* as there was in a limited way from the action of the magistrate.[35] The chief distinction between the magistrate of the pontifical era and the magistrate of the later praetorian era, rested in his power of affecting the cours of procedure apart from the litigants. In the *'legis actio'* procedure, aside from this exceptional *'cognitio extraordinaria'*, the chief function of the magistrate was to see that the ritual of action was observed on the part of the litigants and on his own part. It was essentially a 'party' procedure modified only by pontifical regulations as to the time, manner, and place of presenting claims. In the later phase of procedure, the magistrate had a real and important function; but in both stages the concrete manifestation of litigation was in the hands not of state officers but of the people themselves.

There are many striking features in Roman procedure but this division of function in what most concerns the workable continuity of social life under state regulation is the most significant feature of Roman legal history.[36] The Anglo American jury system partially accomplishes the same leveling purpose of keeping the law in contact with those for whom and upon whom it is administered. The net cost is difficult to measure but in civil litigation it can hardly be doubted that the many certain advantages of the jury system are definitely outweighed by the evils of caprice, prejudice[37] and, especially, an inferior sense of legal obligation.

II.

Another feature of Roman procedure in the periods under review is the absence of state executive process either for purpose of summons to a suit or of satisfaction of a judgment.

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[35] GREENIDGE "LEGAL PROCEDURE" 13.

[36] See BETH.-HOLL. "CP" II, 654 *et seq.*

[37] Holmes (COLLECTED LEGAL PAPERS, 238) regards the element of prejudice as necessary to "keep the administration of the law in accord with the wishes and feelings of the community". The Roman system attempted to do the same thing but by a selective process which excluded from the first the least intelligent and the least capable of the elements of that community.

The remains of the Twelve Tables contain a provision about summons:

> "If a man call another to law, he shall go.[38] If he go not, let it be witnessed; then he shall be seized. If he flee or evade, lays hands on him as he goes. If illness or age hinder, an ox team shall be given him but not a covered carriage if he [?] does not wish."[39]

Later, in practice, the summary method of summons gave way to the *'vadimonium'* by which the defendant (*'reus'*) promised a certain sum in case he did not appear at the proper time before the magistrate.[40] This practice probably grew out of the rule that "upon an appearance before the magistrate if the proceedings are not terminated on the same day, the defendant must give security (*'vadimonium'*) for an adjourned appearance".[42] If the defendant failed to appear his estate was subject to attachment (*'missio in bona'*).[43] The oblique character of Roman procedure is shown by the treatment of the *'indefensus'*, the *'iudicatus'*, and the contumacious defendant.[44] In all of these cases, except where the defendant could be treated as *'confessus'*, as for example when he appeared *'in iure'* (i. e. before the magistrate) and then declined to proceed,[45] a new form of action was necessary to bring him to terms. What is to be particularly noticed in these matters is that there was no state officer at hand to lend physical assistance[46] to the plain-

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[38] PLAUT. "ASIN." VER. 585: "By my faith that surely shall befall you to get a beating as soon as ever I shall see Demeadenetus this day. *I summon you to judgment"*; JHERING "GEIST" II 47c (p. 641); KELLER "CP" 46.

[39] Dean Wigmore's translation based on BRUNS "FONTES": SOURCES OF ANCIENT AND PRIMITIVE LAW, 465.

[40] GAI. iv, 184.

[42] CIC. "P. QUINT.", 6; LEX RUBR., 21.

[43] BETH.-HOLL. II, 106 (esp. p. 558).

[44] KELLER "CP", 65.

[45] In the *'legis actio'* procedure, the presence of the defendant and his participation in the ritual were necessary. Without him, the action could not go forward: BETH.-HOLL. II, 555.

[46] Roman law knew other measures much more effective than *'venditio bonorum'*. Of these the judgment of *'infamia'* was the most drastic in its

tiff, but that he must work out his own relief by such measures as were allowed by law.[47]

Executive force for the satisfaction of judgment was likewise in the hands of the litigant. Personal execution is described by Gellius:[48]

> "Debtors *'confessi aeris'* (who have admitted their debts in court)[49] were allowed thirty days in which to pay, which were called lawful days by the decemvirs, as a kind of *'iustitium'*, that is, a period in which there was a cessation of law as to them and during which no action could be had against them. If they did not make satisfaction then they were called before the *praetor* and by him delivered to those to whom they had been adjudged, and they were bound with fetters. The words of the law [Twelve Tables] are these: 'Thirty days shall be allowed after judgment for the confessed debtor and him who has been adjudged such in court. After that, let him be seized; have him brought to the court. Unless he shall satisfy the debt or some person appears in court as a surety for him, let him be taken away.' There was, however, an opportunity to settle and if no settlement was made the debtors were chained up for sixty days. During that interval the debtors were brought before the *praetor* in the *comitium* on every third market day and the amount of the judgment was announced. On the third market day they were killed or sold in slavery beyond the Tiber. If a debtor was ad-

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civil consequences. In the *pro Quintio*, Cicero stresses this point more energetically than the money dispute with Nævius. One writer has even made of the principle of *infamia* a constitutional factor explanatory of the whole Roman legal establishment: Reich in EVOLUTION OF LAW (Series III), 417.

[47] It is doubtless beside the point, but on the theory of organic unity of institutions, national character, and history, one may wonder how much of assassination in Roman history is to be explained by the prevalence of self-help in Roman procedure. Of the jurists and advocates as of the emperors it may with some justice be said that death other than by stabbing or poison indicates a person of little importance. Cicero himself, to whom we owe much of what is to be known of the legal background of Rome died by assassination (43 B. C.) just before the homicidal exit of Cæsar.

[48] NOCTES ATTICAE xxi, 42 *et seq.*

[49] On the meaning of *'Aeris confessi'* see MUIRHEAD "RL" (2nd ed.), 192; GREENIDGE "PROCED.", 527.

> judged in favor of several creditors, they were permitted to cut up his body and divide it. I shall give you the exact words of the law: 'On the third market-day let them cut their shares; if they cut more or less it shall not be unlawful.' " [50]

It may be observed as further showing the private character of executive process that the Roman debtor was kept not in a public jail but in the private *'carcer'* of his creditor. The extreme rigor to the debtor shown by the Twelve Tables which is in itself remarkable when this legislation was regarded as a reform code exacted from the patricians by the plebeians, probably was rarely if ever resorted to. Like the *'ius vitae ac necis'* (the power over life and death) of the *paterfamilias,* it represented the theoretical limit of what the creditor might do even though he was restrained to stop short by the force of custom and religion. The practice of *'manus iniectio'* gave way, as might be expected, to remedies against the debtor's estate.[51] This mitigation did not, however, alter the rule of private force.[52]

Looking back we find the pontifical procedure a strictly ceremonial method of adjusting litigation, the forms and rituals of which were prescribed by a priestly college which had a monopoly of this knowledge. There were no written pleadings and a litigation was so shrouded in ceremony as to give it a purely artificial appearance where the substance of the controversy seemed to be only an incident of a solemn drama.[53] The slight-

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[50] For a statement of the controversy on this drastic provision of the Twelve Tables, see MUIRHEAD "RL" 196 with the references there noted of which see particularly KOHLER "SHAKESPEARE VOR DEM FORUM DER JURISPRUDENZ" Wurzburg, 1883 (a second edition has recently appeared (Rothschild, Berlin).

[51] See SOHM "INST.", 42; GREENIDGE "PROCED.", 178; BETH.-HOLL. "CP" II § 112.

[52] CIC. P. QUINT.

A recently discovered Assyrian law code shows to what extent private executive force prevailed in ancient law: "AN ASSYRIAN LAW CODE" (translation by M. Jastrow, Jr.), JOUR. AM. ORIENT. SOC. xli Part I (Feb. 1921): see §§ 3, 13, 22.

[53] Jhering makes a brilliant analysis of this formalism: "GEIST" II § 47 *et seq.*

est deviation from the ritual was perilous.[54] It might even be fatal to the action.[55] The litigants must appear in person and could not be represented by advocates before the magistrates.[56] Usually, the magistrate himself was only a ceremonial figurehead whose function went no further than to see that the forms were properly observed.[57] The state through its magistracy interposed in the administration of justice only far enough to substitute a procedure which obviated the primitive remedies of private vengeance. When the controversy was brought to issue, it was tried not by the magistrate but by one of the standing colleges of judges, the *'decemviri'* or the *'centumviri'*, or was remitted to *'recuperatores'*, to *'arbitri'*, or the *'unus iudex'*.[58] This brings the discussion down to the significant change in procedure whereby the formula was instituted and whereby the law under praetorian development adapted itself to the commercial and political needs of a world state.

III.

For the greater part of a period of a thousand years the development of Roman law was in the hands of jurists. While the mechanics of this development were of a different sort than

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[54] This is characteristic of all early procedure. See NYALS SAGA; HEUSLER IN EVOLUTION OF LAW Series II 638.

[55] Cf. GAI. iv, 11.

[56] GAI. iv 82; HEUSLER LOC. CIT., 643; POST "GRUNDLAGEN", 146.

[57] GREENIDGE "PROCED.", 83. It may be said with justice that the functions of the American judge hardly extend further. There are sufficient historical reasons why any departure from the umpire status was at once dangerous and tardy. The primary interest of the state is to function as a social machine. The taking over of the administration of justice by the state out of the sphere of the blood-feud could only be accomplished by a method of procedure which inspired confidence in the adversaries that the state would not use its power to favor one or the other. This activity of the state in adjustment of private quarrels was relatively a late one as compared with its power of war, taxation, and administration of public property. In its early growth the state is far more interested in peace than in justice, and, again, since a lawsuit is necessarily adversarial, the initiative in the assertion of claims was safely left to the self-interest of the adversaries themselves.

[58] See GAI. iv, 15. The practice of naming a single judge was extended by the *lex Pinaria*.

in our own law, yet, on the whole, it much resembled the method of growth of English Common Law. The administration of justice seemed to be a function in which the state was little interested. Its chief concern was local, colonial, and provincial political arrangements, and military affairs. The progressive force of Roman law for centuries resided in the edictal power of the *practor* who on entering office published the rules which he would enforce during his term of office. In the course of time these annual edicts were crystallized into the perpetual edict of Salvius Julianus.[59] The expansive force of Roman legal development lay in the responses of jurists (*'responsa prudentium'*).[60] The *'ius respondendi'* of the jurists came to an end after Modestinus, the last of the classical jurists. After the close of the third century the only responses were those of the emperor (*'rescripta principis'*).[61] During these centuries there came into being a complete body of law which standing alongside the brusque sentences of the Twelve Tables makes it difficult to realize that the one had any connection with the other. Theoretically, prior to the codification by Justinian, there were three bodies of law in existence in Rome: (1) the *'ius gentium'*, i. e., the common law of mankind as contrasted with natural law;[63] (2) the *'ius civile'* derived from statutes, plebiscites, decrees of the senate, and proclamations of the emperor;[64] and (3) the *'ius honorarium'* or praetorian law introduced by the *praetor* "to aid, supplement, or amend the civil law."[65] The actual result of this parallelism was that the *'ius honorarium'* slowly absorbed the *'ius gentium'* on one hand and the *'ius civile'* on the other producing an entirely new product in

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[59] In the reign of Hadrian (117-138 A. D.). The text has not survived, but it has been in part reconstructed from classical commentaries by Lenal under the title "DAS EDICTUM PERPETUUM" (2nd ed. 1907); see GIRARD "TEXTES". (Edit des Magistrats p. 137 *et seq.*).

[60] DIG. 1, 2, 49.

[61] CZYHLARZ "INST." § 11.

[62] Perhaps we should say verses (*'carmina'*). See FUSTEL DE COULANGES IN EVOLUTION OF LAW, Series II, 108.

[63] Dig. 1, 1, 4 (Ulpian).

[64] Dig. 1, 7 (Papinian).

[65] Dig. 1, 7, 1; 1, 2, 10; 1, 2, 27 (28).

the classical era[66] which, with the additions made by the emperors, was consolidated into the Byzantine codification.

While the substantive law was being radically transformed, the procedural law was leading the way. The *'legis actio'* procedure of the pontifical period would have been insufficient to accomplish the thoroughgoing changes in the letter of the law which followed the political developments of the republic. At any rate, Roman law would not have become the law that we know under that name. It is highly improbable that it would have ascended into the modern world. The reason is obvious. If litigation had continued to be carried out on an oral formula there would have been no record of law. There would have been nothing for the commentator. It is entirely conceivable that the *'legis actio'* procedure could have been adapted in one way and another, as had adready been done before the advent of the written formula of the *praetor,* to the demands of the changing times; but it is inconceivable that there could have been any recorded progress in the law itself, or that this progress in the law would follow lines of any consistency or relative stability.[67]

How the formula procedure came to be introduced is a matter of controversy and here conjecture must take the place of evidence.[68] It is fairly certain, however, that the formula procedure was employed by the peregrin *praetor* before it gained a place in the album of the urban *praetor;* and it is also proba-

[66] In the strict sense, the era of the Antonines and the Severi (96-235 A. D.). See CORNIL "RL", 5. SHERMAN "RL" fixes the classical period beginning A. D. 98 with Celsus (legal adviser to Trajan) and ending A. D. 244 (death of Modestinus).

[67] MAINE "ANC. L." says: "the Greek intellect with all its mobility and elasticity was quite unable to confine itself within the strait waistcoat of a legal formula". He further remarks that they confounded law and fact (p. 81). This suggestion fits the point. Roman law itself would have confused law and fact. The psychic temperament of the Greeks had nothing to do with the fact that the Greeks did not rival the Romans in law. Had the method of judicature at Rome and Athens been reversed, half the civilized world today would live under Greek law as all of it now lives under Greek philosophy.

[68] GIRARD "MANUEL" (5th ed.), 996; CUQ "INST." II, 731; WLASSAK "PROZESS" II, 301.

ble that before the appointment of the peregrin *praetor* (242 B. C.) the single *praetor* who then administered law both to Roman citizens and to foreigners had already resorted to the device of circumscribing the legal issues which came before him by means either of an oral or a written direction to the *iudex*.[69]

Gaius tells us that the statute procedure (*'legis actio'*) fell into discredit because of the exaggerated subtlety (*'nimia subtilitas'*) which the ancient jurists attached to it.[70] Accordingly, the statute procedure gave way to the system of formulas or written instructions of the *praetor* to the *iudex*.[71] It is more likely that the decadence of the *'legis actio'* was due to the fact that it was unable to accommodate itself to the growing powers of the *praetor*.[72] And in the field of procedure the same phenomena was found which progressively transformed the whole face of the *'ius civile'* from a rigid, formal and ceremonial body of law into a flexible system adapted to the objective needs of legal transactions. The reformation of Roman law was not accomplished by means of legislation but through the *imperium* of the *praetor*.[73] The principal agency through which these changes were realized was through the control of litigation by means of the formula. The broadened scope of the *praetor's* influence on the law was comparable to the growth of equity jurisdiction in Anglo-American law,[74] but with this difference—Roman law was administered through a single court, while English law prior to the judicature acts was administered by two courts. The result was that at Rome the older law (*'ius civile'*) was progressively changed into a new product by contact with the newer, equity law (*'ius honorarium'*) while in our own system of law, due to the mechanical fact of existence of two kinds of

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[69] In turn, this practice probably was adopted from a Greek model which seems to have become transplanted into Sicily, the first Roman province. See CORNIL "RL", 418.

[70] GAI. iv, 30.

[71] *Idem.*

[72] POSTE "GAI. INST.", 474.

[73] SOHM "INST." § 36.

[74] POSTE "GAI. INST.", 475.

courts administering two kinds of justice, the law still continues to have a dual character.

It is not to be supposed, of course, that the change from the old to the new procedure was accomplished at one stroke. It is probable that the formula procedure was already in use before the date of the *'lex Aebutia'*. While the formula procedure had an existence of nearly five hundred years, it was for a long period paralleled by the pontifical procedure of ancient times.[75] Its development like the growth of equity jurisdiction was from case to case. The pontifical procedure continued until the time of Augustus when it was substantially abolished by the *'leges Juliae'*.[76]

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[To be continued.]

[75] Cicero's *pro Domo* is an interesting example of resort to the college of pontificals at a time when the formula procedure was already well established.

[76] GAI. iv, 30; KELLER-WACH "CP", 111.